STATE OF MICHIGAN

COURT OF APPEALS

DANNY CALDWELL and KELLY CALDWELL,

Plaintiffs,

and

LINDA S. BERKER,

Appellant,

v

DELTA LAND SURVEYING AND ENGINEERING, INC.,

Defendant-Appellee,

and

PARKWOOD DEVELOPMENT, INC., TED D. GOUPIL, and PATRICIA A. GOUPIL,

Defendants/Third-Party Plaintiffs-Appellees,

and

DAVID G. BILICKI, INC., DAVID G. BILICKI, and EVELYN M. BILICKI,

Third-Party Defendants.

UNPUBLISHED
October 12, 2006

No. 260791
Genesee Circuit Court
LC No. 01-070288-CE

DANNY CALDWELL and KELLY CALDWELL,

Plaintiffs-Appellants,

v

DELTA LAND SURVEYING AND

No. 260796
Genesee Circuit Court
LC No. 01-070288-CE

ENGINEERING, INC.,

Defendant-Appellee,

and

PARKWOOD DEVELOPMENT, INC., TED D. GOUPIL, and PATRICIA A. GOUPIL,

Defendants/Third-Party Plaintiffs-Appellees,

and

DAVID G. BILICKI, INC., DAVID G. BILICKI, and EVELYN M. BILICKI,

Third-Party Defendants.

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

In a prior appeal, this Court affirmed the trial court's orders granting summary disposition in favor of defendants, but remanded for further proceedings regarding attorney fees and costs. *Caldwell v Delta Land Surveying & Engineering, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket No. 241913). On remand, the trial court explained that it previously declined to award defendants costs because it felt sympathetic toward plaintiffs. But the court subsequently determined that plaintiffs' action was frivolous and granted separate motions for sanctions brought by defendant Delta Land Surveying and Engineering, Inc. (hereafter "Delta Land Surveying) and defendants Parkwood Development, Inc., Ted Goupil, and Patricia Goupil (hereafter the "Parkwood defendants"), and held that plaintiffs and their attorney, Linda Berker, were jointly and severally liable for the sanctions. Plaintiffs and Berker each appeal as of right. We affirm in part, reverse in part, and remand for further proceedings.

We reject plaintiffs' and Berker's respective challenges to the adequacy of the trial court's findings on remand from this Court. Although this Court instructed the trial court to make specific findings of fact regarding any motions for costs and attorney fees brought by Delta Land Surveying and the Parkwood defendants, generally "[f]indings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4). A trial court's findings are adequate it if appears that the court was aware of the issues and properly applied the law. *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994). "A judge is presumed to know and understand the law." *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002).

Here, it is clear from the Parkwood defendants' and Delta Land Surveying's motions that they sought a judicial determination of taxable costs and sanctions pursuant to MCR 2.114(E) (document certified in violation of the court rule), MCR 2.114(F) (frivolous claim subject to costs under MCR 2.625(A)(2)), and MCR 2.625(A)(1) (prevailing party allowed costs in action). Although the trial court did not specify the court rule(s) on which it relied, it is apparent from the trial court's decision discussing the frivolousness of plaintiffs' claims that it applied MCR 2.114(F), as permitted by MCR 2.625(A)(2), in finding that plaintiffs and Berker were jointly and severally liable for sanctions. We find no support in the record for plaintiffs' and Berker's claims that the trial court failed to determine whether sanctions were legally authorized and instead believed that the Parkwood defendants and Delta Land Surveying were automatically entitled to sanctions as prevailing parties. Indeed, the order entered with respect to Delta Land Surveying specifically indicates that the court found that the professional negligence claim was frivolous at the time of filing "for being factually and legally unsupportable." A court speaks through its orders. *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999).

Under MCR 2.625(A)(2), "if a court finds on motion of party that an action . . . was frivolous, costs shall be awarded as provided by MCL 600.2591." The statute provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591.]

We review a trial court's finding that an action was frivolous for clear error. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). The trial court's decision regarding the amount of attorney fees and costs to be awarded for a frivolous action is reviewed for an abuse of discretion. *John F Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171-172; 712 NW2d 731 (2005); *In re Attorney Fees & Costs*, 233 Mich App 694, 704; 593 NW2d 589 (1999). Questions of law concerning the interpretation or application of a statute are reviewed de

novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

Neither plaintiffs nor Berker have established clear error in the trial court's finding that plaintiffs' action was frivolous. Contrary to what plaintiffs argue, MCL 600.2591 does not impose a different standard for determining whether an action is frivolous for purposes of imposing sanctions against a party, as opposed to an attorney. When a statute is clear and unambiguous, it must be enforced as written. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). MCL 600.2591(1) clearly and unambiguously establishes responsibility for costs and fees on both the nonprevailing party and the attorney if the court finds that an action was frivolous. The statute penalizes both attorneys and litigants who file lawsuits or defenses without a reasonable inquiry into the facts or legal basis of the claim. *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991). The purpose of sanctions is to deter parties and attorneys from asserting claims and defenses that were not sufficiently investigated and researched, or were intended to serve an improper purpose. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998).

Although the definition of "frivolous" in MCL 600.2591(2) refers only to the conduct of a "party," "an attorney is an agent or substitute who acts in the stead of another." *FMB-First Michigan Bank, supra* at 726. Therefore, while the statute serves a deterrent purpose by imposing individual liability on the attorney, it plainly does not require a trial court to apply the statute's definition of "frivolous" to the individual circumstances of the attorney and client. Rather, in this case, we must treat Berker as plaintiffs' agent for purposes of reviewing the trial court's finding that the action was frivolous.

For purposes of MCL 600.2591, an action is considered frivolous if at least one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Only MCL 600.2591(ii) and (iii) are relevant in this case. Both provisions are evaluated under an objective standard. *Attorney Gen v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003); *Davids v Davis*, 179 Mich App 72, 89-90; 445 NW2d 460 (1989). A finding that a plaintiff's action was frivolous depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). The proper focus is on the claims alleged at the time the lawsuit was filed. *In re Attorney Fees & Costs, supra* at 702. The mere fact that a plaintiff does not prevail does not render a complaint frivolous. *Kitchen, supra* at 662. But evidence produced during the proceeding (or lack thereof) may be used to evaluate whether the action was frivolous from its inception. See *Davids, supra* at 89-90.

Here, plaintiffs and Berker rely on the August 6, 2004, affidavit of Lawrence Shoffner, a real estate attorney, regarding his review of documents and his opinion that plaintiffs' action was not frivolous, to support their arguments that the trial court clearly erred. Although the record indicates that Shoffner's affidavit was discussed at the August 9, 2004, hearing, MCR 2.119(B)(1) requires that an affidavit be made on personal knowledge, state with particularity facts admissible as evidence, and show affirmatively that the affiant can testify competently to the facts in the affidavit. Under the rules of evidence, an expert opinion must at least assist the trier of fact in understanding the evidence or determining a factual issue. MRE 702.

Shoffner's affidavit contains information that the trial court was capable of assessing itself from its familiarity with the case or review of the record. Even assuming that Shoffner would qualify as an expert, neither plaintiffs nor Berker have established the admissibility of Shoffner's affidavit or its relevancy to the trial court's decision. "The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003).

The material question is whether the claims in plaintiffs' original complaint for rescission of the sales agreement and professional negligence claims against Parkwood Development and Delta Land Surveying, as well as the added claim against Ted Goupil after the Parkwood defendants brought the "as is" sales agreement to the attention of the trial court by motion, had a sufficient basis, grounded in fact and law, to avoid a finding of frivolousness. *Kitchen, supra* at 662. Plaintiffs and Berker give only cursory treatment to these specific claims. In any event, we are satisfied from our review of the record that the trial court did not clearly err in finding that plaintiffs' claims were frivolous under MCL 600.2591(3)(a).

Plaintiffs' original complaint sought rescission of the sales agreement based solely on a theory of mutual mistake. Although the sales agreement was not filed with the original complaint, plaintiffs, or at least plaintiff Danny Caldwell, should have had knowledge of its terms because he signed the agreement. See *Scanlon v Western Fire Ins Co,* 4 Mich App 234, 238; 144 NW2d 677 (1966) (in the absence of fraud in the making of a contract, a party is held to knowledge of the terms of a contract). Even if plaintiffs did not know the terms of the sales agreement, there is no record evidence that plaintiffs or Berker made a reasonable inquiry to ascertain the terms before seeking rescission. There is, at best, evidence that Berker stipulated to summary disposition after the Parkwood defendants produced the "as is" sales agreement. Because plaintiffs' rescission claim lacked arguable legal merit, we find no clear error in the trial court's imposition of sanctions relative to this claim.

In light of plaintiffs' failure to offer any viable legal argument for imposing a legal duty on Parkwood Development, independent of the sales agreement, we further hold that the trial court did not clearly err in finding that the professional negligence claim against Parkwood Development was frivolous. Plaintiffs' claim was devoid of arguable legal merit from the inception. Plaintiffs' claim in their amended complaint against Ted Goupil, in which plaintiffs sought to establish liability by piercing the corporate veil, fails for this same reason. Further, neither plaintiffs nor Berker have shown that the professional negligence claim against Ted Goupil, grounded on his creation of Parkwood Development, had arguable legal merit when the amended complaint was filed.

Finally, neither plaintiffs nor Berker have shown any basis for disturbing the trial court's finding that their professional negligence claim against Delta Land Surveying, arising from the 1994 site plan that it prepared for the condominium complex, was frivolous. Richard Kraft's certification on the 1994 site plan should have alerted plaintiffs or Berker to the fact that he provided engineering services. Further, the trial court could reasonably find from the record that plaintiffs' legal position that Delta Land Surveying was responsible for the flooding to their condominium unit was devoid of arguable legal merit from the inception of this case.

Turning to plaintiffs' and Berker's arguments concerning the amount of sanctions, we do not agree that the trial court erred by failing to conduct an evidentiary hearing. A trial court has discretion to determine sanctions without an evidentiary hearing if it has sufficient evidence to determine the amount of attorney fees and costs. *John F Fannon Co, supra* at 171-172. Here, the billing statements and itemized costs provided by the Parkwood defendants and Delta Land Surveying were sufficient to enable the trial court to determine the amount of reasonable fees and costs to be included in the award under MCL 600.2591(2). We reject Berker's claim that the Parkwood defendants and Delta Land Surveying were required to detail the legal authority for each item claimed. Although the power to tax costs is wholly statutory, *J C Bldg Corp II v Parkhurst Homes,* 217 Mich App 421, 429; 552 NW2d 466 (1996); *Beach v State Farm Mut Automobile Ins Co,* 216 Mich App 612, 621; 550 NW2d 580 (1996), the Parkwood defendants and Delta Land Surveying sufficiently presented their claim for sanctions under MCL 600.2591 for the trial court's consideration.

Further, while the trial court's decision was brief, it is apparent from the record that the court did not merely accept the billing statements on their face. The court was not required to detail its findings with respect to each relevant factor considered in determining the reasonableness of costs and attorney fees. *John J Fannon Co, supra* at 171-172. We are satisfied from the record that the trial court considered relevant factors. The difficulty of the case and the results achieved were considered by the court when imposing sanctions at the August 9, 2004, hearing. Further, this was not a case in which objections were made to the hourly rate charged by the attorneys. Rather, plaintiffs' objections were directed at the services claimed. The trial court's decision indicates that it was aware of this issue and resolved it. It specifically stated that it "fly specked" the billing statements and found that they were not unreasonable. We conclude that the trial court's findings were adequate. The court did not abuse its discretion in determining the amount of attorney fees and costs to be awarded as sanctions without conducting an evidentiary hearing.

We agree, however, that the trial court erred by including appellate costs and attorney fees incurred in the prior appeal in its award of sanctions. This Court did not order appellate costs and attorney fees in the prior appeal. As a matter of law, the trial court lacked the authority to award such costs and attorney fees on its own. "[I]t is inappropriate to expand the scope of MCR 2.114, 2.625(A), and MCL 600.2591; MSA 27A.2591 to cover costs, including attorney fees, incurred on appeal and remand of a frivolous action." *DeWald v Isola (After Remand),* 188 Mich App 697, 703; 470 NW2d 505 (1991).

The Parkwood defendants' request that this Court now order sanctions arising from the earlier appeal is not properly before us. To properly preserve and present this issue, the Parkwood defendants were required to file an appropriate motion under MCR 7.211(C)(8) after this Court issued its prior opinion on May 4, 2004.

Because the trial court's orders do not specify the amounts attributable to appellate attorney fees and costs, we remand this case for redetermination of the appropriate amount of sanctions under MCL 600.2591(2), without consideration of appellate attorney fees and costs. *DeWald, supra* at 703.

We decline to consider Berker's challenge to the trial court's order denying reconsideration of its award of sanctions. Berker's argument is not properly before us because it is not set forth in the statement of the question presented. See MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Further, Berker does not identify the palpable errors that she claims were shown. This Court will not search the record to find factual support for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also *Peterson Novelties, Inc, supra* at 14.

Finally, we decline to consider plaintiffs' claim that the trial court abused its discretion by denying reconsideration for the purpose of correcting the award of appellate attorney fees and costs. Plaintiffs did not move for reconsideration on this ground below and, therefore, this issue is not preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In any event, in light of our decision to vacate the award of appellate attorney fees and costs as a matter of law, plaintiffs' argument is moot.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219(A), none of the parties having prevailed in full.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot